No. 11088

In the United States Circuit Court of Appeals for the Ninth Circuit

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

THE BANK OF CALIFORNIA, NATIONAL ASSOCIATION, EXECUTOR OF THE ESTATE OF MARGARET EYRE GIRVIN, DECEASED, RESPONDENT

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX COURT OF THE UNITED STATES

BRIEF FOR THE PETITIONER

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CITATIONS

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OPINION BELOW

The memorandum opinion of the Tax Court (R. 29–33) is not officially reported.

JURISDICTION

This case involves estate tax. The Commissioner's notice of deficiency (R. 10–14) was mailed to the taxpayer on June 23, 1943 (R. 4, 15). Within ninety days thereafter, and on July 14, 1943, the taxpayer filed its petition with the Tax Court for redetermination under Section 272 of the Internal Revenue Code. (R. 1, 3–14.) The decision of the Tax Court that

there is no deficiency in estate tax was entered December 7, 1944. (R. 2, 33–34.) The case is brought to this Court by petition for review, filed March 1, 1945 (R. 2, 34–42), pursuant to the provisions of Sections 1141 and 1142 of the Internal Revenue Code.

QUESTION PRESENTED

Whether a transfer in trust made by the decedent in 1924 was intended to take effect in possession or enjoyment at or after the decedent's death within the meaning of Section 811 (c) of the Internal Revenue Code where she reserved the income for life and there was also a possibility that the corpus would revert to her or her estate by operation of law.

STATUTE AND REGULATION INVOLVED

The statute and regulation involved are set out in the Appendix, *infra*, pp. 15–17.

STATEMENT

The Tax Court found the following facts (R. 29–31):

The decedent died January 16, 1941, a resident of California, at the age of seventy-eight. On June 26, 1924, she created a trust consisting of property which on the date of death had a fair market value of $97,-854.81. No part of this value was included in the estate tax return filed by her executor, the taxpayer herein. (R. 29.)

The trust in question was established shortly after the death of decedent's husband on April 5, 1924. His last will and testament was probated on June 25 of that year. His estate consisted in part of an un-

divided one-half interest in the community property of the marital community consisting of himself and decedent. The subject matter of the trust created by decedent was her half of that community property. (R. 29.)

The husband's will created a trust under the terms of which the income was payable to the wife, this decedent, during her life and after her death the trust fund was to be divided between his son Richard and his daughter Lee in such shares and proportions that the son should receive one moiety or equal half part of the trust fund less seven thousand five hundred dollars and that the daughter should receive one moiety or equal half part of the trust fund and in addition the seven thousand five hundred dollars. It was also provided that should either of the children die in the lifetime of the wife, this decedent, leaving issue at her death such issue should take the share which their parent would have taken; and it was further provided that should either of the children die in the lifetime of the wife, this decedent, without issue then on the death of the wife the survivor should take the whole of the trust fund. (R. 24, 29–30.)

The trust created by decedent, after referring to the death of her husband and the creation of the trust under his will, appointed the same trustee and transferred to it her one-half interest in the community property upon the same terms as stated in the husband's will with respect to his trust. (R. 30.)

On June 26, 1924, Richard Girvin, decedent's son, had three children, and Lee Girvin Tevis, her daughter, had two children; both children, all five grandchildren,

and a great grandchild born subsequently were all alive at the date of the hearing in the Tax Court. (R. 31.)

The Commissioner included the value of the property of the trust created by the decedent in her gross estate and upon review the Tax Court held such action erroneous. (R. 33.)

STATEMENT OF POINT TO BE URGED

The essential error to be urged as ground for reversal is the failure of the Tax Court to hold that the principal of the trust established by the decedent on June 26, 1924, should be included in the gross estate under Section 811 (c) of the Internal Revenue Code as a transfer intended to take effect in possession or enjoyment at or after the grantor's death.

SUMMARY OF ARGUMENT

The Tax Court was plainly wrong in holding that the instant transfer was not intended to take effect in possession or enjoyment at or after the grantor's death. The grantor reserved the income for life and there was also a possibility that the corpus would revert to her or her estate by implication of law if she survived the remaindermen designated in the trust indenture. In the circumstances, the determination of the ultimate possession or enjoyment of the property was delayed until at or after the decedent's death and it was not until then that absolute and complete dominion was or could be acquired by the remaindermen. The decedent's death enlarged and matured the interests of the beneficiaries and the transfer is accordingly taxable.

ARGUMENT

The corpus of the trust should be included in the gross estate as a transfer intended to take effect in possession or enjoyment at or after the grantor's death

The Tax Court's opinion was rendered on December 7, 1944, which was prior to the decisions of the Supreme Court in *Fidelity Co.* v. *Rothensies,* 324 U. S. 108; *Commissioner* v. *Estate of Field,* 324 U. S. 113; and *Goldstone* v. *United States,* decided June 11, 1945 (C. C. H. Inheritance, Estate and Gift Tax Service, par. 10,209). These cases clarify and interpret *Helvering* v. *Hallock,* 309 U. S. 106, in such a way as to indicate clearly that transfers such as the instant one are taxable under Section 811 (c) of the Internal Revenue Code (Appendix, *infra*) as transfers intended to take effect in possession or enjoyment at or after the grantor's death.[1]

In *Fidelity Co.* v. *Rothensies,* the decedent had created a trust to pay the income to the settlor during her life and at her death to her two daughters during their respective lives. At the death of each daughter the corpus supporting her share of the income was to be paid to her descendants. If both daughters died without leaving surviving descendants, the corpus was to be paid to such persons as the settlor might appoint by will. The Court, utilizing the principles set forth in *Klein* v. *United States,* 283 U. S. 231, and *Helvering* v. *Hallock, supra,* held the

[1] Since this trust was created in 1924, we are not here relying upon the amendments of 1931 and 1932 relating specifically to the retention of income for life; those amendments operate prospectively only. *Hassett* v. *Welch,* 303 U. S. 303.

full value of the corpus includible in the grantor's gross estate as a transfer intended to take effect in possession or enjoyment at or after the grantor's death under Section 302 (c) of the Revenue Act of 1926, which has been carried forward into Section 811 (c) of the Internal Revenue Code. In so holding the Court said (pp. 111–112):

> It is fruitless to speculate on the probabilities of the property being distributed under the contingent power of appointment. Indeed, such speculation is irrelevant to the measurement of estate tax liability. The application of this tax does not depend upon "elusive and subtle casuistries." *Helvering* v. *Hallock, supra,* 118. No more should the measure of the tax depend upon conjectures as to the propinquity or certainty of the decedent's reversionary interests. It is enough if he retains some contingent interest in the property until his death or thereafter, delaying until then the ripening of full dominion over the property by the beneficiaries. The value of the property subject to the contingency, rather than the actuarial or theoretical value of the possibility of the occurrence of the contingency, is the measure of the tax. That value is demonstrated by the consequences that would flow in this instance from the decedent's survival of her daughters and any of the latter's surviving descendants.

In the *Field* case, the decedent created a trust during his lifetime, reserving the income for life and also the right to get back the corpus if he should survive his two nieces. He did not survive them and it was held that the full value of the trust property

was includible in his gross estate under Section 302 (c). In so holding, the Court referred to its decision in the *Fidelity* case and also said (p. 116):

> The estate tax is not based on the value of the reversionary interest of the decedent at the time of his death but on the value at the time of his death of the property to which that reversionary interest relates. It makes no difference how vested may be the remainder interests in the corpus or how remote or uncertain may be the decedent's reversionary interest. If the corpus does not shed the possibility of reversion until at or after the decedent's death, the value of the entire corpus on the date of death is taxable.

In the *Goldstone* case the decedent had purchased a single premium life insurance policy and an annuity policy in combination. The death benefits under the life contract and a refund under the annuity contract were payable at the decedent's death to his wife, or, if she predeceased him, to their daughters. If the decedent survived both his wife and daughters, the proceeds were payable to his estate. The incidents of ownership as to each contract could be exercised by the decedent's wife during her lifetime and upon her death such rights were exercisable by the decedent if he survived her. The wife did not exercise her rights of ownership and she outlived the decedent and became the recipient of the proceeds of the policies when he died. The Court held such proceeds includible in the decedent's gross estate under Section 302 (c). In so holding the Court took the view that the

wife's unused powers, if significant at all, only added to the remoteness of the reversionary interest and did not erase it; and since such interest existed at the time of the decedent's death, delaying until then the determination of the ultimate possession or enjoyment of the property, the transfer was taxable.

It will be noted that in deciding the foregoing cases the Court did not undertake to draw any distinction between express reversions on the one hand and implied reversions on the other. Indeed, the language of the opinions indicates clearly that none should be made. Thus in *Fidelity Co.* v. *Rothensies, supra,* where there was an express reservation of a contingent power of appointment but no express provision with respect to the possibility of the decedent's surviving her daughters and their descendants, the Court treated as relevant the consequences that would flow in that case from such survival. This demonstrates, we submit, that for the practical purposes of the estate tax a possibility of reversion by implication of law is just as effective as one expressly retained. The applicable regulation (Section 81.17 of Treasury Regulations 105 (Appendix, *infra*)) is in harmony with this view, providing, as it does, that it is immaterial whether the decedent's interest arose by implication of law or by the express terms of the instrument of transfer.

With these principles in mind, there seems little doubt as to the taxability of the instant transfer. Here the decedent not only retained the income for life but there was also a possibility that the trust property would revert to her or her estate by implication of

law if she survived all the remaindermen designated in the trust instrument. Restatement, Trusts (1935), Sec. 411; Restatement, Trusts, Cal. Ann. (1940), Sec. 411; *Estate of Steele,* 124 Cal. 533; *Estate of Hamon,* 136 Cal. App. 517; *United States* v. *Tonkin,* 150 F. 2d 531 (C. C. A. 3d), petition for certiorari pending. Indeed, that possibility was recognized in the opinion of the Tax Court in the instant case. (R. 32.) And since the possibility of reversion existed at the time of the decedent's death, and the interests of the beneficiaries were enlarged and matured by such death, we submit that this transfer is plainly within the scope of the statute.

The instant case is quite similar to *Eldredge* v. *Rothensies,* 150 F. 2d 23 (C. C. A. 3d), petition for certiorari pending, which was decided in favor of the Government. It is true that there the settlor expressly reserved a contingent power of appointment over the corpus, while here the reversionary interest results from operation of law, but we submit for the reasons given above that this distinction is immaterial.

In reaching its decision in the instant case the Tax Court, relying upon *Commissioner* v. *Kellogg,* 119 F. 2d 54 (C. C. A. 3d); *Lloyd's Estate* v. *Commissioner,* 141 F. 2d 758 (C. C. A. 3d); *Estate of Allen* v. *Commissioner,* 3 T. C. 844; and *Frances Biddle Trust* v. *Commissioner,* 3 T. C. 832, took the view that a remote possibility of reversion by operation of law is unimportant in determining whether the statute is applicable. To the extent that the Kellogg case may be thought to support that view, we submit that it is out of harmony with the principles enunciated in the

Supreme Court cases cited above, and should, therefore, be disregarded. Indeed, the Third Circuit in its more recent opinion in the *Eldredge* case, *supra,* said that insofar as any expressions in the *Kellogg* opinion may be in any way inconsistent with the *Fidelity Co.* case, *supra,* they must be taken to be overruled.

The other three cases relied upon by the Tax Court (*Lloyd's Estate* v. *Commissioner, supra; Estate of Allen* v. *Commissioner, supra;* and *Frances Biddle Trust* v. *Commissioner, supra*) are distinguishable. In those cases the grantor did not reserve the income for life [2] and the provisions for distribution of the corpus were made without reference to his death. In the circumstances the grantor's death did not have enough effect upon the ultimate possession or enjoyment of the trust property to make the transfer taxable. Although appeals were at first filed in the *Biddle* and *Allen* cases to protect the interests of the Government, the Solicitor General has now reconsidered the matter and authorized the dismissal of the appeals. It is readily apparent that the situation in the instant case is materially different; under the terms of this trust the remaindermen did not and could not acquire full and complete dominion over the property until the grantor died. Cf. *Mullikin* v. *Magruder,* 149 F. 2d 593 (C. C. A. 4th). The grantor's death ripened and en-

[2] Although the retention of a life interest *alone* can not be made the basis for taxability prior to the 1931 amendment to the statute (see footnote 1, *supra*), it may nevertheless be a relevant consideration, which, taken together with other facts of the case, render the transfer one intended to take effect in possession or enjoyment at or after death.

larged the interests of the remaindermen, and it is clear that their rights were conditioned upon survivorship in a very real sense and within the meaning of Section 81.17 of the Treasury Regulations.

It is interesting to note that the Tax Court has recently changed its views as regards this type of case and held in a situation quite similar to the one here presented that there was a taxable transfer. *Estate of Leaman* v. *Commissioner,* 5 T. C. No. 84.

The taxpayer may rely upon *United States* v. *Brown,* 134 F. 2d 372, where under circumstances comparable to those here presented this Court held the transfer non-taxable. But that case was decided in February, 1943, which was some two years prior to the recent Supreme Court decisions. This Court in the *Brown* case expressed the view that the trust arrangement was a palpable substitute for a will but felt that under the Supreme Court cases as they then stood the transfer was not taxable. The latest utterances of the Supreme Court have now clarified the matter and there is no doubt that where, as here, the decedent had the income for life plus a string upon the corpus, the transfer is taxable.

The taxpayer may refer to *Central Hanover Bank & Trust Co.* v. *United States,* 58 F. Supp. 565 (C. Cls.). In that case the grantor had created a trust to pay the income to herself for life and upon her death to pay the principal to her three children and the survivor or survivors in equal shares, but if any of the children predeceased her and left issue surviving, such issue were to receive the share of their parent. There was no provision in the trust agreement with respect

to the disposition of the corpus in the event that the grantor should survive the three children and their issue. The court originally held (57 F. Supp. 497), correctly, we submit, that the retention by the grantor of the income for life together with the possibility that the corpus might revert to her if she survived the beneficiaries made the transfer taxable under *Helvering* v. *Hallock, supra.* But thereafter the taxpayer made a motion for a new trial, which was granted, and the decision was changed (58 F. Supp. 565, *supra*), one judge dissenting.

The majority opinion takes the view that if the grantor had survived her children and their issue, it is doubtful under the New York law, which governed the construction of the trust instrument, whether the trust property would have reverted to her by operation of law or would have gone upon her death to the heirs of the survivor of the children and their issue. The court further says that in any event they are satisfied that she thought she was completely disposing of the property, save only for the reserved life interest, when she created the trust and since this was her intention the transfer could not be considered as one intended to take effect in possession or enjoyment at her death.

We submit that this decision and the reasoning underlying it are patently erroneous. In the first place the taxpayer has the burden of proof as to local law where that is pertinent (*Helvering* v. *Fitch,* 309 U. S. 149, 156; *Helvering* v. *Leonard,* 310 U. S. 80, 86), and if he fails to carry it clearly and convincingly, the case should be decided in the Government's

favor. Moreover, it is thought that there is little basis for the court's doubt, for it is the general rule that where a trust fails for want of beneficiaries the property will revert to the grantor or his estate by implication of law and this is also the rule in New York (*Newton* v. *Hunt,* 134 App. Div. 325, 334, affirmed, 201 N. Y. 599; *Doctor* v. *Hughes,* 225 N. Y. 305), as well as in California (*Estate of Steele, supra; Estate of Hamon, supra*). Furthermore, the Court of Claims seems to have drawn out of thin air its conclusion that the grantor could not have intended the transfer to take effect in possession or enjoyment at or after her death. She retained the income for life and also a contingent reversionary interest in the corpus, thus holding in suspense and delaying until death or thereafter the ultimate possession or enjoyment of the trust property. In the circumstances, nobody except the grantor could actually enjoy the economic benefits from the property until after the grantor died, and we submit that her executor was without standing to urge that she did not intend the result which was actually achieved. Finally, the Court of Claims erred in making its decision turn upon the grantor's subjective intention. The test is not a subjective one; it is essentially objective, and has been so treated in all of the Supreme Court cases.

A similar case is now pending in the Third Circuit on appeal by the Commissioner from the Tax Court's decision in *Estate of Church* v. *Commissioner,* decided December 4, 1944 (1945 P-H T. C. Memorandum Decisions, par. 45, 134). A similar point is involved in *Estate of Gallois* v. *Commissioner,* 4 T. C. 840, appeal

to this Court now pending, No. 11080, present term.

In light of the foregoing considerations we submit that the decision of the Tax Court is unsound and at variance with the principles stated in the governing Supreme Court decisions.

CONCLUSION

The decision of the Tax Court should be reversed.

Respectfully submitted.

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APPENDIX

Internal Revenue Code:

SEC. 811. GROSS ESTATE.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

* * * * *

(c) *Transfers in Contemplation of, or Taking Effect at Death.*—To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. * * * (26 U. S. C. 1940 ed., Sec. 811.)

Treasury Regulations 105, promulgated under the Internal Revenue Code:

SEC. 81.17. *Transfers conditioned upon survivorship.*—The statutory phrase, "a transfer * * * intended to take effect in possession or enjoyment at or after his death," includes

a transfer by the decedent prior to his death (other than a bona fide sale for an adequate and full consideration in money or money's worth) whereby and to the extent that the beneficial title to the property transferred (if the transfer was in trust), or the legal title thereto (if the transfer was otherwise than in trust), is not to pass from the decedent to the donee unless the decedent dies before the donee or another person, or its passing is otherwise conditioned upon decedent's death; or, if title passed to the donee, it is to be defeated and the property is to revert to the decedent as his own should he survive the donee or another person, or the reverting of the property to the decedent is conditioned upon some other contingency terminable by his death. In such instances, it is immaterial whether the decedent's interest arose by implication of law or by the express terms of the instrument of transfer. Since in such transfers the decedent's death is requisite to a termination of his interest in the property, it is unimportant whether his interest be denominated a reversion or a possibility of reverter, and whether the interest of the donee be contingent or vested subject to be divested, and the tax will apply, unless otherwise provided in the next succeeding paragraph, without regard to the time when the transfer was made, whether before or after the enactment of the Revenue Act of 1916. Thus, upon a transfer by a decedent of property in which an estate for life is given to one and an estate in remainder to another, but with a provision added that the estate in remainder shall revest in the decedent should he survive the owner of the life estate, there is to be included, in determining the value of the decedent's gross estate following his death, the value as of the date of his death of the estate in remainder, if the life estate is then outstanding. The value of the outstanding life estate is not to be included in determining

the value of the gross estate, unless that estate had been transferred in contemplation of the decedent's death, or otherwise as to render it a part of the gross estate. If by reason of an election by the executor the valuation of the gross estate is governed by the provisions of section 81.11, adjustments in the values of such transferred estates may be required. (See section 81.15.)

Where the transfer was made during the period between November 11, 1935 (that being the date upon which the Supreme Court of the United States rendered its decisions in the cases of *Helvering* v. *St. Louis Union Trust Co.* (296 U. S. 39) and *Becker* v. *St. Louis Union Trust Co.* (296 U. S. 48)), and January 29, 1940 (that being the date upon which such Court rendered its decisions in *Helvering* v. *Hallock* and companion cases (309 U. S. 106)), and the Commissioner, whose determination therein shall be conclusive, determines that such transfer is classifiable with the transfers involved in such two cases decided on November 11, 1935, rather than with the transfer involved in the case of *Klein* v. *United States* (283 U. S. 231), previously decided by such Court, then the property so transferred shall not be included in the decedent's gross estate under the provisions of this section, if the following condition is also met: Such transfer shall have been finally treated for all gift tax purposes, both as to the calendar year of such transfer and subsequent calendar years, as a gift in an amount measured by the value of the property undiminished by reason of a provision in the instrument of transfer by which the property, in whole or in part, is to revert to the decedent should he survive the donee or another person, or the reverting thereof is conditioned upon some other contingency terminable by decedent's death.

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